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No. 96-1695

In the Supreme Court of the United States

OCTOBER TERM, 1996

ATTALA COUNTY, ET AL., PETITIONERS

v.

BERNARD TEAGUE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals held that proof of the three *Gingles* factors in a case under Section 2 of the Voting Rights Act establishes vote dilution.

2. Whether the court of appeals misapplied the clearly erroneous standard in rejecting the district court's finding that blacks and whites prefer different candidates for reasons other than race.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 58-85) is reported at 92 F.3d 283. The district court's opinion after remand (Pet. App. 32-57) is unreported. The opinion of the court of appeals (Pet. App. 26-31) remanding to the district court is reported at 17 F.3d 796. The initial opinion of the district court (Pet. App. 1-25) is reported at 807 F. Supp. 392.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 1996. A petition for rehearing was denied on January 22, 1997. Pet. App. 86. The petition for a writ of certiorari was filed on April 22, 1997. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Respondents challenge the redistricting plans of Attala County, Mississippi, for the election of its five county supervisors and five election commissioners, and of its two county constables and two justice court judges, alleging that the plans dilute minority voting strength in violation of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973. Each candidate is elected from a single-member district by majority vote. Although African-Americans comprise 39.5% of the population in Attala County, and 35.4% of the voting age population, no black candidate has ever won a contested election from a white majority district, despite a number of attempts. Pet. App. 8, 35, 39, 41, 55 & n.16, 59. African-Americans are a minority in four of five supervisor-election commissioner districts and in both constable-justice court districts. Pet. App. 60.

1. In its first decision, the district court found that respondents failed to prove a Section 2 violation. The district court found that respondents met the first *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), precondition in that African-Americans are sufficiently numerous and geographically compact to constitute a majority in two of five supervisor districts and one of two constable districts. Pet. App. 16-17. But it found that respondents had not met the second and third *Gingles* preconditions of black political cohesion and white bloc voting. The district court rejected respondents' statistical analysis of black-white elections from 1979 to 1991 in favor of election returns from two precincts in two elections which it found showed some cross-

over voting, and anecdotal testimony of one politician that race is not a factor in county elections. *Id.* at 17-19. The district court found respondents' ecological regression analysis "nondemonstrative of a minority vote dilution claim," *id.* at 22, and rejected respondents' extreme case analysis because it analyzed only white voter preferences. *Id.* at 18-19; see also *id.* at 29.

Further, the court found that even if the three *Gingles* preconditions had been satisfied, the totality of the circumstances demonstrates that blacks and whites have an equal opportunity to elect candidates of their choice, citing the success of black candidates in black majority districts,[1] equal statewide voter registration rates for whites and blacks, improvement in the socioeconomic status of blacks over the past ten years, the lack of a candidate slating process, and no evidence of racial appeals in election campaigns. Pet. App. 7-9, 21-23. Although the district court found that "blacks continued to trail the levels of attainment for whites in every significant area," *i.e.*, income, education, housing, and employment, *id.* at 9-10, it identified voter apathy, rather than discrimination or lower socioeconomic status, as the cause of minority candidate defeat. *Id.* at 23.

2. The court of appeals vacated the district court's judgment and remanded for a more thorough examination of the evidence, particularly of respondents'

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[1] In addition to the sole black county supervisor district, there were instances of black candidate success in black majority districts of local government bodies not involved in this case—for example, aldermanic districts for towns within Attala County. See Pet. App. 7-8, 59-60.

statistical evidence on racially polarized voting. The court of appeals held:

> The district court is not obliged to accept statistical evidence as conclusive on the question whether racially polarized voting exists. * * * But in making its intensely fact-specific inquiry here, the district court ought to have discussed appellants' statistical evidence more thoroughly because that was the principal evidence they offered and because their statistics had at least surface plausibility. Further, the district court findings on the subjects of racial polarization and minority political cohesion are broad and general and not explicitly tied to the testimony, although many witnesses were called in the case.

Pet. App. 30.

3. On remand, the district court again concluded that the redistricting plans do not violate Section 2.[2] In reviewing the statistical evidence, the district court found that respondents' original expert, using ecological regression analysis of eight black-white elections, showed an average of 15% white support and 87% black support for black candidates, and 85% white support and 13% black support for white candidates. Pet. App. 45. Respondents' post-remand expert, using ecological regression analysis of the three post-remand elections, found that between 86.3% and 92.8% of black voters supported black candidates, while between 12% and 25.2% of white voters supported black candidates. Pet. App. 45. The United States' expert, using ecological regression analysis of six elections,

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[2] The United States intervened on remand in support of respondents.

found on average 89.5% of black voters and 17.1% of white voters supported black candidates, while 82.9% of white voters and 10.5% of black voters supported white candidates. *Id.* at 45-46; C.A. R.E. tab 12, at 11. Respondents' experts confirmed these findings using extreme case analysis. Pet. App. 47.[3]

The court found the statistical findings of petitioners' expert, who used only ecological regression analysis, "similar to the above findings of [respondent]s' experts." Pet. App. 46; see also *id.* at 44 ("[The] statistical evidence produced by both sides * * * was somewhat similar."). It concluded that "there can be no doubt that the statistical evidence in the record favors a finding of racial bloc voting in Attala County." *Id.* at 48.

Nonetheless, the district court failed to find racially polarized voting. It found that "[a]lthough statistical evidence may weigh in favor of a finding of racial polarization, the court is of the opinion that this evidence alone is not sufficient. Plaintiffs have failed to establish * * * that voters in Attala County cast their vote on the basis of race, to the exclusion of other nonracial factors." Pet. App. 51. It came to this conclusion in spite of finding "no proof in the record that in any way compares the candidates on any basis other than race." *Id.* at 50. The court relied instead on the testimony of two local politicians who stated that factors other than race influence voters and

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[3] Because there are no homogenous black precincts in Attala County, extreme case analysis directly confirms only the white voting patterns. However, the United States' expert directly confirmed both black and white voting patterns using complementary overlapping percentages analysis, which does not require homogenous precincts. Pet. App. 62; C.A. R.E. tab 12 at 13-14 & n.14.

determine election outcomes in Attala County. *Id.* at 51. It also relied on the same two instances of black crossover voting it identified in *Teague I*: The 1991 primary election for Sheriff, Sallis precinct, where at least 232 black voters (41% of black voters) voted for white candidates, and the 1987 primary election for constable, McCool precinct, where the black candidate received only 96 votes, which, the court held, suggested that many blacks in that precinct voted for white candidates. *Id.* at 19-20; 48.

The district court went on to find that, even if respondents had proven the three *Gingles* factors, under the totality of the circumstances blacks nonetheless have an equal opportunity to participate in the political process and elect representatives of their choice. Pet. App. 52. The court made a number of findings relating to the *Gingles* factors that would suggest a Section 2 violation. It found that "no black candidate has ever won a contested election for a county office in a majority-white election district." *Id.* at 39, 55. It acknowledged the long history of discrimination against blacks in Mississippi and Attala County, *id.* at 52-53, and found that "[t]here can be no question of the socioeconomic disparities between whites and blacks in Attala County." *Id.* at 52-53. It also found that past discrimination and socioeconomic disparities have "a significant impact on present day politics in Attala County," *id.* at 55, and noted the depressed levels of black voter registration and turnout in the County.[4] *Id.* at 54. The court, how-

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[4] Notably, the court did not reiterate its finding from *Teague I* that there was no evidence of racial appeals in election campaigns. Indeed, the record contains testimony of segregationist campaign appeals in Attala County and derogatory

ever, discounted these circumstances because it found that voter apathy also has a significant impact on Attala County politics. *Id.* at 55. The court cited comparable statewide voter registration for blacks and whites, and expert testimony by a retired political science professor that national and statewide voter apathy led to a sharp decline in voter participation among both blacks and whites from 1988-1990. *Id.* at 54-55, 63.

4. On a second appeal, a different panel of the court of appeals reversed the district court, ordered entry of judgment for respondents, and remanded for remedial proceedings. The court concluded that the district court's failure to find racially polarized voting was clearly erroneous because the only outcome permitted by the record was a finding of racially polarized voting. It held that two isolated instances of *black* crossover voting and the contested testimony of two politicians that race does not affect county elections does not "overcome the admittedly compelling statistical evidence of racial bloc voting." See Pet. App. 69-70, 76. The court also held that the district court erred by "plac[ing] upon the plaintiffs the insurmountable burden of coming forward with evidence disproving all nonracial reasons that can explain election results in spite of the fact that the defendant had itself produced no real evidence that factors other than race were at work." *Id.* at 75. Instead, the court of appeals held that "[a] defendant may try to rebut plaintiffs' claim of vote dilution via evidence of 'objective, nonracial factors under the totality of the circumstances standard.'" *Id.* at 76

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racial comments by county supervisors, including the board president. Tr. 171-173, 193-195, C.A. R.E. 13.

(quoting *Nipper* v. *Smith*, 39 F.3d 1494, 1513 (11th Cir. 1994) (en banc) (Tjoflat, C.J.), cert. denied, 115 S. Ct. 1795 (1995)).

The court overturned the district court's finding that there is no racial bloc voting. The court stated that racial bloc voting need not be "absolute" to satisfy *Gingles*; it need only be "the usual pattern for a significant portion of voters." Pet. App. 68-69 (citing *Gingles*, 478 U.S. at 57). The court stated that "[i]n the face of a strong statistical case that defendants were unable to shake, general statements that race played no role at the polls carry little weight," *id.* at 75, and that the lay testimony in this case was "ambiguous at best and certainly not dispositive." *Id.* at 76. The court stated that one of the two politicians on whose testimony the district court relied to support its finding that Attala County voters are not influenced by race also testified that whites in Attala County do not campaign for black candidates. *Id.* at 73. The court of appeals noted that a third local politician testified that there were racially hostile encounters between whites and black politicians, and that a fourth, who was a witness for petitioners, admitted that it is harder for a candidate to become popular with voters of a different race because social life in Attala County is racially segregated. *Id.* at 73-74. As in the first appeal, the court of appeals recognized that

> [t]he district court is not obliged to accept statistical evidence as conclusive on the question whether racially polarized voting exists. *Teague*, 17 F.3d at 798. Still, the district court does have an obligation to give particularized findings when it discredits the statistical evidence, especially

> where the evidence is weighty. And it is weighty here. Indeed, the district court did not even have to choose among competing opinions based on the statistics. The results of the regression analyses of both plaintiffs' and defendants' experts were consistent. And when the district court looked to lay testimony, even the anecdotal evidence was conflicting.

Id. at 74. The court agreed with the district court that statistics do not capture all the reasons motivating a voter, but faulted the district court for refusing to give any weight at all to the admittedly strong statistical evidence. *Id.* at 74-75.

The court of appeals also held that the district court clearly erred in finding that, even if the three *Gingles* preconditions were present, the totality of the circumstances demonstrates that blacks have an equal opportunity to participate in the political process. Pet. App. 80. The court of appeals noted that "[a]lthough there may be cases in which even proof of the three *Gingles* factors may not sustain a vote dilution claim, this is certainly not such a case." *Id.* at 76.

In particular, the court of appeals found "untenable" the district court's ascription of depressed levels of black political participation and black electoral losses to voter apathy, particularly in light of the "long and dubious history of discriminati[on] against blacks," the "grave socioeconomic disparities" between whites and blacks, and the 20% disparity between black and white voter registration in Attala County. Pet. App. 59, 81, 82. The court held that "[t]he record before us does not contain evidence to support the district court's conclusion that voter

apathy is the reason for the failure of blacks in Attala County to elect the candidates of their choice to political office." *Id.* at 84. Moreover, the court considered it "counterintuitive" to attribute the inability of blacks to elect candidates of their choice to apathy, when apathy affects all voters, both black and white. *Id.* at 83-84. As the court held, "[t]he fact that blacks *and* whites in Attala County are going to the polls in decreasing proportions does not explain why blacks alone are essentially shut out of the political process of the county." *Id.* at 84.

ARGUMENT

The court of appeals correctly applied Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, to the record before it and correctly determined that certain key factual findings by the district court were clearly erroneous. The decision of the court of appeals does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioners contend (Pet. 16-18) that the court of appeals' decision conflicts with *Johnson* v. *De Grandy*, 512 U.S. 997 (1994), *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), and seven federal appellate decisions because it applies a presumption that the presence of the three *Gingles* preconditions establishes a violation of Section 2. The court of appeals did not apply any such presumption, and its decision is therefore consistent with all of the cited cases.

De Grandy held that the three *Gingles* factors do not "necessarily and in all circumstances demonstrate[] dilution." 512 U.S. at 1011. "[C]ourts must also examine other evidence in the totality of circumstances." *Ibid.* See also *Abrams* v. *Johnson*, No. 95-

1425, 1997 WL 331802 (June 19, 1997), slip op. 15-16. Citing *De Grandy*, the court of appeals explicitly held that "a finding of the three *Gingles* preconditions does not end the inquiry. Reviewing courts are to look beyond the *Gingles* threshold factors when evaluating vote dilution claims." Pet. App. 76; see also *id.* at 65 ("Even if plaintiffs satisfy [the *Gingles*] prerequisites, the court must still look to the 'totality of the circumstances' to determine whether the challenged electoral system is equally open to minority voters.").

Petitioners construe (Pet. 15-17) the court of appeals' statement that it would be "unusual" for a plaintiff to establish the three *Gingles* factors without also establishing a violation of Section 2 as creating a legal presumption that proof of the *Gingles* factors establishes a Section 2 violation. That construction misreads the court's holding. The court of appeals stated:

> [I]t will be only the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of § 2 under the totality of the circumstances. In such cases, the district court must explain with particularity why it has concluded, under the particular facts of that case, that an electoral system that routinely results in white voters voting as a bloc to defeat the candidate of choice of a politically cohesive minority group is not violative of § 2 of the Voting Rights Act.

Pet. App. 80-81 (quoting *Clark* v. *Calhoun County*, 21 F.3d 92, 97 (5th Cir. 1994)).[5]

The court of appeals' comment clearly did not place any limits upon the district court's totality of the circumstances review, nor did it lessen the respondents' burden of proof under that standard. Instead, the court of appeals simply acknowledged that the *Gingles* preconditions typically encompass the major elements of a vote dilution claim. The court of appeals correctly noted that when plaintiffs already have established that white bloc voting routinely defeats the candidates of choice of a politically cohesive minority, a district court, before ruling against plaintiffs, must point to specific and credible evidence providing a nonracial explanation for this fact, or at least evidence weighing heavily against plaintiffs on other relevant matters (*e.g.*, historical discrimination and socioeconomic disparities) unrelated to racial bloc voting and minority electoral success. Pet. App. 72-76. In this case, the district court (after two opportunities) did neither, relying instead on arbitrary assumptions and speculative conclusions as evidence. Thus, the court of appeals' conclusion that the district court erred in its totality of the circumstances analysis was a straightforward application of established law.

The court of appeals' decision is entirely consistent with *De Grandy*, *Gingles*, and the seven court of appeals decisions cited in petitioners' footnote. See Pet. 16-17 n.7. After examining the three *Gingles* factors, the court of appeals examined other relevant

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[5] The three court of appeals decisions that petitioners cite in a footnote (Pet. 16 n.6) as similarly in conflict with *De Grandy* contain the same language.

considerations to determine whether the totality of the circumstances established vote dilution in violation of Section 2. Pet. App. 76-84. It did not limit the "canvassing of relevant facts," *De Grandy*, 512 U.S. at 1011, as petitioners contend. Pet. 16. Rather, it held that blacks do not have an equal opportunity to participate in the political process and elect candidates of their choice only after a "searching practical evaluation of the past and present reality." *Gingles*, 478 U.S. at 79 (internal citation omitted). In addition to the three *Gingles* factors, the court cited Mississippi's "long and dubious history of discriminati[on] against blacks," the current "grave socioeconomic disparities" between blacks and whites, Pet. App. 81, the depressed levels of black political participation in Attala County, and the fact that no black has ever been elected to office in a contested election from a majority white district. *Id.* at 59-60, 82-84. The court also evaluated, and rejected as without evidentiary support, the district court's finding of voter apathy as the cause of black electoral losses, and noted the lack of evidence in the record to support any other nonracial explanation of the statistical evidence. *Id.* at 83-84.

Indeed, it was the district court that limited its totality of the circumstances review. As the court of appeals pointed out:

> [t]he district court did not take adequate notice of the considerable statistical evidence of vote dilution. The conclusion it drew in its totality discussion is similarly dubious, relying entirely on the denials of a few lay witnesses and ignoring the contrary testimony of others. The district court did not place this testimony in the context

> of the area's history of voter exclusion nor give voice to any plausible nonracial explanation for Attala County's voting patterns.

Pet. App. 81. Thus, contrary to petitioners' contention, the court of appeals followed clearly established standards for determining whether Section 2 has been violated. [6]

2. Petitioners advance two related contentions regarding the court of appeals' treatment of the racial bloc voting issues in the case. They contend that the court of appeals "confined Petitioners' proof of nonracial explanations [for the different voting patterns of black and white voters] to evidence that voters choose candidates based on partisanship, not race," Pet. 23, and that the court of appeals "improperly substitut[ed] its view of the facts for that of the District Court" regarding whether "county voters cast their ballots not on the basis of race but, rather, on the candidates' qualifications, education, contact with the electorate, and experience," Pet. 18. Those contentions are wrong. The court of appeals did not limit the evidence that could be considered on these issues, and it correctly articulated and applied the well-established clearly erroneous standard. As the court stated, under that standard "a finding is 'clearly

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[6] Petitioners' contention (Pet. 17-18) that the court of appeals collapsed the second and third *Gingles* factors into a single statistical analysis is wrong. The court of appeals separately considered black political cohesion and white bloc voting. See Pet. App. 69-71. Black political cohesion was evidenced by ecological regression analysis of black voting preferences. White bloc voting was evidenced by ecological regression analysis and extreme case analysis of white voter preferences. That is the standard method of proving racially polarized voting by blacks and whites. See *Gingles*, 478 U.S. at 52, 55-61.

erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Pet. App. 64 (quoting *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573 (1985)).

a. The court of appeals did not improperly confine petitioners' proof. In reviewing the district court's findings, the court recognized that "[t]he analysis the district court must make to evaluate a § 2 claim is [a] fact-intensive [inquiry], requiring 'an intensely local appraisal of the design and impact of the contested electoral mechanisms.'" Pet. App. 64 (quoting *Gingles*, 478 U.S. at 79). Further, the court of appeals held that under the totality of the circumstances "[a] defendant may try to rebut plaintiffs' claim of vote dilution via evidence of 'objective, nonracial factors'" that explain voting patterns. *Id.* at 76 (quoting *Nipper* v. *Smith*, 39 F.3d 1494, 1513 (11th Cir. 1994) (en banc) (Tjoflat, C.J.), cert. denied, 115 S. Ct. 1795 (1995)). However, in this case, the court of appeals stated that the record "is devoid of any proof that [nonracial] factors * * * are as or more important than race in predicting voting behavior in Attala County." *Id.* at 72. Even the district court found "no proof in the record that in any way compares the candidates on any basis other than race." *Id.* at 50. The court of appeals thus could not have limited petitioners' proof of nonracial factors because there was no such evidence in the record.

Petitioners select (Pet. 23) one sentence from the court of appeals' opinion to support their claim that the court limited its review of nonracial explanations to partisan politics. The court of appeals stated:

> We are not denying that the ultimate inquiry of Section 2 is racial discrimination; nor are we holding that a defendant cannot offer evidence of the nonracial reasons for the voting patterns. In *LULAC* we did not hold that the plaintiff has the burden of negating all nonracial reasons possibly explaining plaintiffs' statistical case. *That case concerned a different problem—the role of partisan politics.*

Pet. App. 84 (emphasis added). This discussion of *League of United Latin American Citizens* v. *Clements*, 999 F.2d 831 (5th Cir. 1993) (en banc), cert. denied, 510 U.S. 1071 (1994), does not suggest that the court has improperly limited the proof of nonracial explanations to partisan politics. The court simply contrasted *LULAC*, in which the court of appeals found that defendants offered substantial, objective evidence that partisan politics better explained the electoral outcomes, to this case, in which there was no objective evidence of *any* nonracial explanation and the district court improperly required plaintiffs to disprove all possible nonracial explanations. See Pet. App. 84.

b. The court of appeals correctly applied the clearly erroneous standard in rejecting petitioners' claim that black and white voters prefer different candidates for reasons other than race. This is not a case in which the court of appeals substituted its judgment for the district court's by choosing between two plausible views of the evidence, as petitioners allege. See Pet. 19. The district court's analysis misapplied the burden of proof. See Pet. App. 72, 74-75. In addition, the district court disregarded the standard methodology for proving racial bloc voting approved

by this Court, see *id.* at 69, 72, 75, and disregarded the court of appeals' remand order that it should base its conclusions on particularized findings of fact, see *id.* at 75. As the court of appeals held, the evidence of racial polarization was "overwhelming," *id.* at 70, 75, and the district court's failure to find racial polarization was not supported by the evidence. See *id.* at 69, 72, 74, 76.

(i). The district court misapplied the burden of proof by improperly "plac[ing] upon the [respondents] the insurmountable burden of coming forward with evidence disproving all nonracial reasons that can explain election results in spite of the fact that the defendant had itself produced no real evidence that factors other than race were at work." Pet. App. 75; see also *id.* at 72, 74. Petitioners admit that it would be error to require such a showing, but claim that the district court committed no such error. Pet. 24 n.8.

To the contrary, the district court's error is clear. The district court found that respondents "failed to establish that voters in Attala County cast their vote on the basis of race, to the exclusion of other nonracial factors, such as a candidate's experience, qualifications, education and contact with the electorate." Pet. App. 51. It made this finding even though it acknowledged that "[c]onspicuously missing from the record in this [case] is any proof to the contrary. Of the black-white elections analyzed, there is no proof in the record that in any way compares the candidates on any basis other than race." *Id.* at 50. And as the court of appeals pointed out, "[t]he lack of evidence in the record on this point favors the [respondents], not the [petitioners]." *Id.* at 72.

(ii). In weighing the evidence, moreover, the district court clearly erred by placing undue weight on

isolated instances of *black* crossover voting in two precincts in two elections and on controverted, conclusory testimony of two politicians, and by disregarding the consistent evidence of racially polarized voting spanning 13 years that the district court itself found to be strong. See Pet. App. 47-48, 51, 69-74. Petitioners state that "[t]he District Court found that the expert testimony presented by the parties 'on racial bloc voting patterns varied considerably.'" Pet. 18 (quoting Pet. App. 44). But this partial quotation is incomplete. The district court's full finding is: "At trial, *expert testimony* on racial bloc voting patterns varied considerably, although *statistical evidence* produced by both sides on the same was somewhat similar." Pet. App. 44 (emphasis added). The district court reiterated that the statistical findings of petitioners' expert "were similar to the above findings of [respondents'] experts," *id.* at 46,[7] and found that "there can be no doubt that the statistical evidence in the record favors a finding of racial bloc voting in Attala County." *Id.* at 48; see also *id.* at 51.

The court of appeals found that the meager, conjectural and controverted rebuttal evidence identified by the district court simply did not support the dis-

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[7] Petitioners' expert report shows levels of estimated white and black support for black candidates similar to the levels found by respondents' experts. See Defs.' Response to Pls.' Post-Remand Evidentiary Proffer and Defs.' Proffer, Attach. B, Tables 1 & 2 (filed July 8, 1994). Petitioners' expert also conceded that racial polarization exists in exogenous elections. *Id.*, Attach. A, Weber Decl. ¶ 11 (analyses of congressional elections "reveal a pattern of some racial differences in voting preferences"); *id.* at ¶ 12 (finding "[r]acial polarization in voting" in analyses of exogenous county-wide or state-wide elections).

trict court's conclusion that "[f]actors such as a candidate's experience, qualifications, education and contact with the electorate are of much greater significance than race to voters in Attala County." Pet. App. 50. The court of appeals acknowledged that "while the [district] court does have discretion in the manner in which it weighs the facts, the statistical evidence here is so one-sided as to require a more convincing discussion of the lay testimony before refuting the objective results." *Id.* at 76.[8] As the court of appeals held, "[i]n the face of a strong statistical case that [petitioners] were unable to shake, general statements that race played no role at the polls carry little weight." *Id.* at 75. Accordingly, the court of appeals correctly concluded that the record

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[8] In *Abrams* v. *Johnson*, No. 95-1425, 1997 WL 331,802 (June 19, 1997), this Court reiterated the legal principles applied by the court of appeals in this case. *Abrams*, slip op. 15-16. The Court held in *Abrams* that the three-judge district court's findings of lack of racially polarized voting were adequately supported by the record in that case. That conclusion is entirely consistent with the court of appeals' finding that, on the much stronger evidence in this case, the district court had clearly erred in finding a lack of racially polarized voting. In *Abrams*, "the statistical evidence was for the most part inconclusive and conflicting." *Abrams*, slip op. 17. Here, by contrast, the statistical evidence presented by both sides was consistent and demonstrated the existence of racially polarized voting. See Pet. App. 48, 69. Finally, the *Abrams* district court found "a general willingness of white voters to vote for black candidates," slip op. 18, and it noted that candidates of choice of black voters had "achieved many electoral victories in local and statewide elections and have received significant—occasionally overwhelming—support from both black and white voters" in the district at issue there. Slip op. 17. No such findings were made—or could have been made—on the record in this case.

in this case did not support the district court's failure to give proper weight to the consistent results of regression and extreme case analyses in disregard of the racial bloc voting methodology approved by this Court in *Gingles*, 478 U.S. at 52, 55-61. The court of appeals' record-specific application of established legal principles warrants no further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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REPLY

BRIEF

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BERNARD TEAGUE, *et al.*,

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INTRODUCTION

Petitioners Attala County, Mississippi, *et al.* have argued that this Court should grant certiorari to resolve the conflict between the opinion of the Court of Appeals in this case and the opinions of this Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and *Johnson v. De Grandy*, 512 U.S. 997 (1994). In reply, Respondents Bernard Teague, *et al.* ("Teague Respondents") contend that this is "a garden variety redistricting case" that presents no conflict with the decisions of this Court. Brief in Opposition for Respondents Bernard Teague, et al. ("Teague Opp.") 1; *see also* Brief for the United States in Opposition ("U.S. Opp.") 10 (arguing that the Court of Appeals' opinion "does not conflict with any decision of this Court or any other court of appeals").

In a garden variety redistricting case, however, the court of appeals does not presume a violation of § 2 of the Voting Rights Act, 42 U.S.C. § 1973, from proof of the three *Gingles* preconditions, but rather conducts a "comprehensive . . . canvassing of relevant facts," as *De Grandy* requires. 512 U.S. at 1011. In a garden variety redistricting case, the court of appeals does not substitute its view of the evidence for that of the district court, but rather defers to the district court's findings unless they are clearly erroneous, as *Gingles* requires. *See* 478 U.S. at 78-79. And in a garden variety redistricting case, the court of appeals does not limit the nonracial explanations that defendants may offer to explain differences between the voting patterns of blacks and whites, but rather considers the full range of such explanations, as *Gingles* and the plain language of the statute require. *See id.* at 79. Thus, this is not a garden variety case, and Court should grant the writ of certiorari.

I. THE COURT OF APPEALS IMPROPERLY PRESUMED THAT PROOF OF THE THREE *GINGLES* PRECONDITIONS ESTABLISHES A VIOLATION OF § 2 OF THE VOTING RIGHTS ACT

As discussed in the Petition (at 14-17), the Court of Appeals created a presumption that proof of the *Gingles* preconditions establishes vote dilution, stating:

> "[I]t will be only the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of § 2 under the totality of circumstances. In such cases, the district court must explain with particularity why it has concluded, under the particular facts of that case, that an electoral system that routinely results in white voters voting as a bloc to defeat the candidate of choice of a politically cohesive minority group is not violative of § 2 of the Voting Rights Act."

Appendix to the Petition for a Writ of Certiorari ("App.") 80-81 (alteration in original) (citation omitted). As Petitioners have shown, this holding conflicts with *De Grandy*, which holds that proof of the three *Gingles* factors does not suffice to establish § 2 liability and that courts must engage in a "comprehensive, not limited, canvassing of relevant facts" in deciding whether § 2 has been violated. 512 U.S. at 1011.

The Teague Respondents claim that the Court of Appeals' holding is actually "quite similar to what this Court said in *Johnson* [*v. De Grandy*]: '[L]ack of equal electoral opportunity may be readily imagined and *unsurprising* when demonstrated under circumstances that

include the three essential *Gingles* factors.'" *Id.* (quoting 512 U.S. at 1012). The juxtaposition of the quotations from *De Grandy* and the Court of Appeals' opinion, however, demonstrates the Court of Appeals' error. It is one thing to say that a § 2 violation "*may* be readily imagined and unsurprising" when plaintiffs prove "circumstances that *include*" the *Gingles* preconditions. 512 U.S. at 1012 (emphasis added). It is quite another to say that it "*will* be only the *very unusual* case" in which plaintiffs prove the *Gingles* preconditions but do not win. App. 80 (emphasis added). The former statement says that § 2 plaintiffs may very well win their case if they can prove the *Gingles* preconditions and other circumstances. The latter says that § 2 plaintiffs will hardly ever lose if they can prove the *Gingles* preconditions.

The Teague Respondents also contend that the latter statement is not a presumption but "simply a description of the empirical fact that most plaintiffs who [prove] the three *Gingles* factors go on to prove a violation [of § 2]." Teague Opp. 15. But the message such a "description" sends is unmistakably clear: if the *Gingles* preconditions are satisfied, district courts run a high risk of reversal if they do not also find a § 2 violation. Thus, despite what the Teague Respondents claim, the Court of Appeals did create a *de facto* presumption that proof of the *Gingles* preconditions establishes a § 2 violation.

That the Court of Appeals did so is confirmed by the United States. According to the United States' brief, U.S. Opp. 12, the Court of Appeals

> correctly noted that when [§ 2] plaintiffs already have established that white bloc voting routinely defeats the candidates of choice of a politically cohesive minority, a district court,

> before ruling against plaintiffs, must point to specific and credible evidence providing a nonracial explanation for this fact, or at least evidence weighing heavily against plaintiffs on other relevant matters (*e.g.*, historical discrimination and socioeconomic disparities) unrelated to racial bloc voting and minority electoral success.

In other words, the United States contends that if plaintiffs prove racially polarized voting, they should prevail, unless the district court can "at least" point to other "evidence weighing heavily against [them]."

This contention confirms that the Court of Appeals adopted a presumption that proof of racially polarized voting constitutes proof of vote dilution in violation of § 2. *See* 1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 79, at 376 (2d ed. 1994) ("In civil cases, 'presumption' means a position or stance that must be taken in the absenc of counterproof challenging the basic or presumed facts."). As with other presumptions, the presumption created by the Court of Appeals here has "the effect of shifting the burden of production to the party who would be disadvantaged by a finding of the presumed fact." *Id.* § 66, at 320. That is, once plaintiffs prove the *Gingles* preconditions, defendants must come forward with "evidence weighing heavily against plaintiffs," U.S. Opp. 12; otherwise, plaintiffs will win.

The United States cites no support for this shift in the burden of production, other than the Court of Appeals' opinion, and Petitioners submit that this shift contravenes both *De Grandy* and *Gingles*. In *De Grandy*, this Court held that the *Gingles* preconditions are necessary, but not sufficient, to prove a § 2 claim, 512 U.S. at 1012, and

stated that "factfinders cannot rest uncritically on assumptions about the force of the *Gingles* factors in pointing to dilution." *Id.* at 1013. Under the United States' argument, however, the *Gingles* preconditions are effectively presumed sufficient, unless the district court finds other evidence that "weigh[s] heavily against plaintiffs." As Petitioners have shown, such a ***de facto*** presumption contravenes *De Grandy*'s requirement that a district court make a "comprehensive, not limited, canvassing of relevant facts," *id.* at 1011, and *Gingles*' requirement of "a searching practical evaluation of the past and present reality [to determine] whether the political process is equally open to minority voters," 478 U.S. at 79 (internal quotation marks and citation omitted).[1]

The Court of Appeals' creation of a ***de facto*** presumption that shifted the burden of production to Petitioners warrants granting the Petition. This is so even assuming ***arguendo*** that the Court of Appeals correctly ruled that Respondents proved racially polarized voting. *See De Grandy*, 512 U.S. at 1007-09 (reversing judgment for plaintiffs even though they proved polarized voting).

It is important to remember, however, that the Court of Appeals aggravated the error resulting from the presumption it created in at least two ways. First, the

[1]The United States contends that the Court of Appeals did perform the "searching practical evaluation" that *Gingles* requires by examining Mississippi's history of discrimination, the socioeconomic disparities between blacks and whites, the depressed level of black political participation, and the absence of minority success in majority white districts. U.S. Opp. 13. But the Court of Appeals made this examination only after creating the erroneous presumption discussed above, and, by doing so, improperly "isolat[ed] . . . other arguably relevant facts [*i.e.*, all those other than racially polarized voting] from the act of judgment." *De Grandy*, 512 U.S. at 1012.

Court of Appeals applied the presumption when Respondents sought over-proportional representation (*i.e.*, two black voting-age population ("BVAP") majority districts, out of a total of five, in a county that has a BVAP of only 35%).[2]

The Court of Appeals further aggravated its error by failing to accord due deference to the District Court's findings regarding polarized voting. Under *Gingles* and *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564 (1985), these findings must be affirmed unless clearly erroneous, *i.e.*, unless they are not "plausible in light of the record viewed in its entirety." *Id.* at 573-74.

Respondents answer by saying that the Court of Appeals correctly applied the "clearly erroneous" standard because the District Court's view of the evidence was implausible. Teague Opp. 17; U.S. Opp. 16. In particular, Respondents claim that the District Court erred in relying on the testimony of two local politicians to support its conclusion that voters in Attala County choose candidates on the basis of their qualifications rather than their race. Teague Opp. 17-19; U.S. Opp. 18-19. Respondents characterize this testimony as "flimsy," Teague Opp. 19, "controverted," and "meager," U.S. Opp. 18, and assert that the District Court "plac[ed] undue weight" on it, instead of giving "proper weight" to Respondents' statistical evidence, *id.* 17, 20.

But Respondents' characterizations of the evidence merely prove Petitioners' point that the evidence in this case was vigorously disputed. Respondents' experts

[2]Contrary to what the Teague Respondents claim, Teague Opp. 20, Petitioners do not contend that the County's 35% BVAP provides them with an "absolute defense" to Respondents' claims. Rather, Petitioners claim only that the County's BVAP makes the Court of Appeals' error particularly grave.

offered statistical evidence to prove polarized voting. Petitioners' expert offered "somewhat similar" statistical evidence, but his opinions "varied considerably" from those of Respondents' experts. App. 44.[3] Petitioners also offered lay testimony that "support[ed] [Petitioners'] claims that nonracial factors influence voters and determine election outcomes in Attala County." App. 51.

In particular, Petitioners offered testimony from Troy Hodges, the County Supervisor from District 3, who testified that "'Race won't keep you from being elected'" and that "'blacks won't vote for a candidate just because [the candidate] is black or white.'" App. 50 (alteration in original) (citations omitted). Petitioners also offered testimony from H.L. Myrick, a black alderman who "testified that black and white citizens vote not on the basis of skin color, but on the basis of the candidate and his qualifications." App. 50-51.[4]

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[3]The United States takes Petitioners to task for citing the District Court's finding that the expert testimony "varied considerably," but omitting the District Court's finding that the statistical evidence offered by both parties' experts was "somewhat similar." U.S. Opp. 18 (discussing Petition 18). What the United States ignores, however, is that, earlier in the Petition (at 5), Petitioners were careful to note both that the findings of their expert were similar to those of Respondents' experts and that their expert disagreed vehemently with Respondents' experts as to what the statistics actually proved regarding racial polarization.

[4]The Teague Respondents claim that Myrick's testimony does not support the District Court's finding. In particular, they quote Myrick's testimony that "I haven't experienced" crossover voting (*i.e.*, whites voting for black candidates and vice versa). Teague Opp. 18 (citing Tr. 559-61). The Teague Respondents, however, omit Myrick's subsequent testimony that he did not understand the question about crossover voting, Tr. 560; and they admit that Myrick later testified that he "got both" black and white votes in his election campaign, Teague Opp. 18 (citing Tr. 561). And although the Teague

Faced with this disputed record, the District Court weighed the evidence and found that "there can be no doubt that the statistical evidence in the record favors a finding of racial bloc voting." App. 48. But the District Court also found that "[f]actors such as a candidate's experience, qualifications, education and contact with the electorate are of much greater significance than race to voters in Attala County." App. 50. Given that the District Court (unlike the Court of Appeals) was in a position to gauge the demeanor of the witnesses, and given that court's "particular familiarity with the indigenous political reality," *Gingles*, 478 U.S. at 79, the trial judge's findings regarding the disputed evidentiary record cannot be deemed implausible. Accordingly, under the "clearly erroneous" standard of review, the Court of Appeals should have deferred to the District Court's findings, and its failure to do so conflicts with this Court's holdings in *Gingles* and *Anderson*.[5]

Respondents claim that Myrick "was aware of no whites ever campaigning for a black candidate," *id.*, they overlook his testimony that whites "worked to help me get elected," Tr. 575-76.

[5]The Court of Appeals' substitution of its view of the evidence for that of the trial court also conflicts with *Abrams v. Johnson*, Nos. 95-1425 & 95-1460 (U.S. June 19, 1997). In *Abrams*, this Court reiterated that a trial court's findings regarding the *Gingles* preconditions are "owed deference" and are reviewed only for clear error. *Abrams*, slip op. at 20. Although the United States attempts to distinguish *Abrams*, U.S. Opp. 19 n.8, numerous similarities exist between that case and the present one. In *Abrams*, as in the present case, the United States' expert, using the same statistical techniques employed here, opined that voting was racially polarized. *See Johnson v. Miller*, 864 F. Supp. 1354, 1390 (S.D. Ga. 1994). Like the County's lay witnesses here, lay witnesses in *Abrams*, including a black politician, testified that significant white crossover voting occurred. *Abrams*, slip op. at 17. And, like the District Court here, the district court in *Abrams* credited this testimony. *Id.*

II. THE COURT OF APPEALS IMPROPERLY LIMITED PETITIONERS' PROOF OF NONRACIAL EXPLANATIONS FOR DIFFERENCES IN VOTING PATTERNS

As discussed above, the Court of Appeals rejected Petitioners' nonracial explanations for differences in black and white voting patterns. In so doing, the Court of Appeals distinguished *League of United Latin American Citizens, Council No. 4434 v. Clements,* 999 F.2d 831 (5th Cir. 1993) (en banc), on which Petitioners relied, on the ground that it "concerned a different problem -- the role of partisan politics." App. 84.

The Teague Respondents claim that "*LULAC* was never used by the Court of Appeals to restrict nonracial explanations in this case to partisan voting. . . . [T]he Court of Appeals instead held that the District Court erred because there was 'no real evidence that [any] factors other than race were at work' in the relevant elections." Teague Opp. 13 (second alteration in original) (citation omitted); *see also* U.S. Opp. 16 (making a similar argument).

In holding that there was "no real evidence that [any] factors other than race were at work" in County elections, App. 75, the Court of Appeals erroneously substituted its view of the evidence for that of the District Court. Moreover, in rejecting Petitioners' argument that voting patterns were better explained by candidates' qualifications, education, and experience than by race, the Court of Appeals effectively limited Petitioners' evidence of nonracial explanations to differences in party affiliation. By limiting Petitioners' proof in this manner, the Court of Appeals ran afoul of the language of § 2 and this Court's

decision in *Gingles*. *See* Petition 23-24. For this reason as well, this Court should grant the Petition.[6]

CONCLUSION

For all of the reasons cited above and in the Petition, a writ of certiorari should issue to review the decision of the Court of Appeals in this case.

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[6]In defending the Court of Appeals' treatment of the issue of nonracial explanations for differences in black and white voting behavior, the United States contends that the District Court erroneously imposed on Respondents the burden of disproving all nonracial explanations for the voting patterns. As Petitioners have shown, however, the District Court did not do so, and its treatment of the burden of proof was proper. Petition 24 n.8.